FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 397

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, CHARLES L. DRESSEL, HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES, MILK WAGON DRIVERS' UNION, LOCAL 753, ROBERT G. FITCHIE, JAMES G. KENNEDY, STEVE C. SUMNER, FRED C. DAHMS, F. RAY BRYANT, JOHN O'CONNOR AND DAVID A. RISKIND.

JOSEPH A. PADWAY,
Counsel for Appellees.

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IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 31197

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE BORDEN COMPANY, ET AL.,
Defendants.

STATEMENT AGAINST JURISDICTION OF SUPREME COURT OF UNITED STATES.

In compliance with Rule 12, Paragraph 3 of the Supreme Court of the United States as amended, defendants, Milk Wagon Drivers' Union, Local 753, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dalms, F. Ray Bryant, John O'Connor and David A. Riskind, by Joseph A. Padway, their attorney, submit herewith their statement disclosing the grounds upon which they urge that the Supreme Court of the United States has no jurisdiction upon direct appeal from the Federal District Court to review the judgment entered in this cause, or in the alternative, no jurisdiction on direct appeal from the Federal District Court to review certain parts of said judgment, namely,

insofar as the judgment applies to Count III of the Indictment.

There is no statutory jurisdiction to review by direct appeal from the Federal District Court the judgment entered in this cause with regard to Count III of the Indictment for the following reasons:

1. The ruling on Count III finding that said Count was duplicitous in that it stated several and distinct crimes is a ruling upon pleading and is not a ruling based in any way upon the interpretation of the Sherman Anti-Trust Act. See *United States* v. *Stevenson*, 215 U. S. 190, 54 Law. Ed. 153 (1909).

2. Under the statute permitting direct review, the Supreme Court does not have jurisdiction on direct appeal where the trial court's decision was based upon the "technical insufficiency" of the Indictment to state a good cause of action within the meaning of the statute alleged to have been violated by the defendants. *United States* v. *Barber*, 219 U. S. 272, 55 Law. Ed. 97.

3. The meaning, i. e. the interpretation, of the facts alleged in the Indictment by the trial court will be accepted as final by the Supreme Court of the United States in considering the question whether or not the statute permitting direct appeal is concerned. *United States* v. *Yuginovich*, 256 U. S. 450; 45 Law. Ed. 1131; *United States* v. *Colgate Co.*, 250 U. S. 300; 63 Law. Ed. 992, 7 A. L. R. 443; *United States* v. *Patten*, 226 U. S. 525, 57 Law. Ed. 33, 44 L. R. A. Ms. 325.

Accordingly, the meaning placed by the trial court that as a matter of fact that

> "a restraint of interstate commerce is not definitely alleged in Count III in that it is not definitely charged that the milk sold by stores and independent distrib-

utors was or had been the subject of interstate commerce."

must be accepted as final by the Supreme Court of the United States.

Accordingly, a ruling of the trial court which is based on the insufficiency of facts to state a violation of the Sherman Anti-Trust Act does not involve the validity or construction of the statute within the meaning of the provisions of the Criminal Code giving the United States Supreme Court jurisdiction to entertain a direct appeal. *United States* v. *Pacific Railway*, 228 U. S. 87, 57 Law. Ed. 742; *United States* v. *Hastings*, 296 U. S. 188, 80 Law. Ed. 148.

4. On the direct appeal under the provisions of the Criminal Code, the scope of review is limited to the particular instances enumerated in the Statute. The whole case is not open to review in the Supreme Court. *United States* v. *Keitel*, 211 U. S. 404 at 406, 53 Law. Ed. 251; *United States* v. *Kissel*, 218 U. S. 601, 54 Law. Ed. 1168.

Accordingly, the Supreme Court of the United States has no jurisdiction to revise the interpretation of Count III of the Indictment as adopted by the trial court. *United States* v. *Keitel*, 211 U. S. 370, 53 Law. Ed. 230; *United States* v. *Stevenson*, 215 U. S. 190, 54 Law. Ed. 153; *United States* v. *Miller*, 223 U. S. 599, 56 Law. Ed. 568; *United States* v. *Carter*, 231 U. S. 492, 58 Law. Ed. 330.

Accordingly, the direct appeal will not involve Count III insofar as these defendants are concerned. *United States* v. *Portate*, 235 U. S. 27, 59 Law. Ed. 111.

(Signed) JOSEPH A. PADWAY.

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 31197

UNITED STATES OF AMERICA

vs.

THE BORDEN COMPANY, ET AL.

MOTION.

Now come Milk Wagon Drivers' Union, Local 753, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor and David A. Riskind, defendants, by Joseph A. Padway, their attorney, and respectfully move the Court to dismiss the appeal or to affirm the judgment of Judge Woodward of the District Court of the United States, Northern District of Illinois, Eastern Division, of July 28th, 1939, *or* in the alternative to dismiss the appeal or affirm the judgment in part insofar as it relates to Count III of the Indictment.

(Signed) JOSEPH A. PADWAY.